Supreme Court, U. S.
FILED
AUG 14 1972
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 72-243

CLEAN AIR COORDINATING COMMITTEE,

Petitioner,

vs.

ROTH ADAM FUEL COMPANY,
CHICAGO COAL MERCHANTS ASSOCIATION,
ILLINOIS POLLUTION CONTROL BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Clean Air Coordinating Committee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 3, 1972.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on July 3, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Under the "expressly authorized by Congress" exception to the federal anti-injunction statute, may a federal court stay a state court injunction of state action when that state action was required by the Federal Clean Air Act for a federal pollution control program?
2. Do the implementation plan requirements under the Federal Clean Air Act constitute the assertion of a "superior federal interest" which permits a federal court injunction staying interference with such requirements by a state court action?
3. Is there, as several circuits have held, standing under the "superior federal interest" exception to the anti-injunction statute for a private person acting strictly for the public interest to protect the superior federal interest?

STATUTORY PROVISIONS INVOLVED.

28 U.S.C. §2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

42 U.S.C. §1857c-4

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

42 U.S.C. §1857c-5

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted

under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

42 U.S.C. §1857c-5(a)(2)

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

42 U.S.C. §1857c-5

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

42 U.S.C. §1857d-1. Retention of State authority

Except as otherwise provided in sections 1857f-6a, 1857f-6c(c) (4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or section 1857c-7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. §1857h-5

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b) (1) of this title), any determination under section 1857f-1(b) (5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

STATEMENT OF THE CASE.

On December 31, 1970 the Clean Air Act (42 U.S.C. §1857 [1971]) was substantially revised because the air pollution problem affecting human health was more severe, more pervasive and growing at a more rapid rate than was generally believed. (p. 1 of U.S. Senate Report 91-1196). Because of the national scope of the problem, the federal government was mandated to begin immediately a program of promulgating national ambient air quality standards for various pollutants. Each state, due to its proximity to and knowledge of local pollution problems, was required to supply imput into the federal program. Within nine months after the promulgation of any federal ambient air quality standard for any pollutant, each state had to submit to the Federal Administrator of the United States Environmental Protection Agency ("Federal Administrator") its suggested plan as to how that air quality requirement could be achieved within its borders. (42 U.S.C. §1857c-5[a] [1], 1971). Because air pollution does not respect state borders and because of the need for national standards, each state plan had to contain provisions assuring that standards for one state would not interfere with air quality in neighboring states. (42 U.S.C. §1857c-5[a] [2] [E], 1971). Once the Federal Administrator finalized an implementation plan for a state, that state was forbidden from adopting emission standards or limitations which were less stringent than the standards or limitations contained in the particular finalized federal implementation plan. (42 U.S.C. §1857d-1, 1971). There had, in effect, been federal preemption of minimum standards. There was a provision for judicial review only within thirty days after the Administrator had acted,

providing that such review was taken in the United States Court of Appeals in which the state was located. (42 U.S.C. §1857h-5[b] [1], 1971).

National ambient air quality standards were promulgated for five pollutants including sulphur dioxide and particulate matter. Following requirements of federal law, the Illinois Pollution Control Board ("State Board") formulated a draft implementation plan for the pollutants involved and held public hearings on the draft plan as required by 42 U.S.C. §1857-c(a)(1). The Clean Air Coordinating Committee ("Committee"), a sizable unincorporated association devoted to air pollution control, participated in the public hearing testifying as to what was necessary for the protection of the health of its members.

After the hearings, as the State Board was about to formalize its suggested implementation plan, for transmission as required by federal law to the Federal Administrator for his consideration, an emergency injunction action was filed in state court to prohibit the State Board from passing on sections of its suggested plan dealing with the use of solid fuel in the Chicago Major Metropolitan Area. That state court suit was filed by respondents Roth Adam Fuel Company and Chicago Coal Merchants Association and alleged that a portion of the plan that the state would suggest, in effect, banned the use of coal for residential and commercial space heating in their marketing area. While preliminary ideas regarding the implementation plan had been communicated by the State Board to the Federal Administrator, the state court action would have prevented the formal passage and transmittal of portions of the Illinois implementation plan to the Federal Administrator as required by federal law and would also prohibit

such portions of the suggested plan from also being adopted as state regulations.

The Committee filed suit in the Federal District Court seeking a temporary restraining order (until service was obtained) and a preliminary injunction for a limited stay of the state court proceeding and it was continually made clear to the District Court that the Committe action was limited and was only against that part of the state court proceeding which prevented the passage and transmission of the implementation plan for *federal* purposes. The Committee contended that to that limited extent, the state court action was premature review of the federal implementation plan for Illinois when such review was limited to review in the United States Court of Appeals during a thirty day period after the Federal Administrator had accepted, revised, or replaced the plan that had been suggested by the State Board. (42 U.S.C. §1857h-5[b] [1], 1971).

The Committee pleaded jurisdiction under 28 U.S.C. §1331 due to a federal question and health damage in excess of the jurisdictional amount and, by amendment to the complaint, also claimed jurisdiction under 28 U.S.C. §1337 because the Clean Air Act was passed in the exercise by Congress of its commerce power and because failure of compliance would cause harm to the health of the Committee's members. The State Board and the United States Environmental Protection Agency were made nominal defendants. The United States Environmental Protection Agency was dismissed as a defendant by agreement and just before the District Court suit was stayed, the State Board had indicated that it was going to seek dismissal as a defendant and intervene as a plaintiff.

The Committee submitted an affidavit in support of its position by an assistant professor of environmental and

occupational medicine stating that the delay caused by the state court proceeding would delay federal regulations and that delay would delay steps toward compliance and a delay in steps for compliance would harm human health. No counteraffidavits were presented.

The day after the complaint was filed in the Federal District Court, Roth Adam Fuel Company filed a motion to dismiss based on nonservice (service was shortly gained and was thereafter not in question), and based on alleged lack of federal jurisdiction supposedly because no federal question was involved, and based on the federal anti-injunction statute (28 U.S.C. §2283 [1971]), which allegedly barred the relief sought.

Briefs were filed and arguments heard. The District Court then ruled that it and the state had "concurrent jurisdiction" and that its hand "will be stayed until further notice of this court".

The Committee appealed and the Seventh Circuit Court of Appeals held that the appeal from the type of stay order that had been entered was proper since that order "was the gravamen of the plaintiff's statutory claim". But the Court of Appeals then held that the District Court should have dismissed the suit because the relief sought was barred by the federal anti-injunction statute. The Committee had claimed that the anti-injunction statute was no bar to the relief sought because a superior federal interest (a national plan for control of air pollution) was involved and, independently, because the Clean Air Act expressly authorized such an injunction, for otherwise delays caused by premature state court review would destroy time limits under the act and thereby also would prevent required state imput which could occur only within certain time limits.

REASON FOR GRANTING THE WRIT.

THE DECISION BELOW, WHICH WILL HAVE REOCCURING EFFECTS, MISINTERPRETS THE INTERRELATIONSHIP BETWEEN THE CLEAN AIR ACT AND THE ANTI-INJUNCTION STATUTE LEADING TO AN EMASCULATION OF IMPORTANT SECTIONS OF THE CLEAN AIR ACT DESIGNED SPECIFICALLY TO PROTECT THE HEALTH OF THE CITIZENS OF THIS COUNTRY AND TO CAUSE STATE IMPUT INTO THE FEDERAL REGULATORY PLAN.

The purpose of the revision of the Clean Air Act was "to provide a much more intensive and comprehensive attack on air pollution" and to "establish that the air is a public resource and that those who would use that resource must protect it from abuse, to assure the protection of the health of every American". (S. Rep. No. 1214, 91st Cong., 2d Sess. 4 [1970]). As was stated above, with statutory references, under these amendments national air quality standards were to be promulgated, there were to be federally established interstate and intrastate air pollution control regions, there was federal control over the final content of implementation plans submitted by a state for the implementation, maintenance, and enforcement of the federal air quality standards within the state's borders, and there was federal *pre-emption* in each state of the establishment of minimum limits and standards for emissions once the Federal Administrator finalized the implementation plan for a state. As was stated in the Senate report:

> "The Committee recognizes that the implementation plan is the principal component of control efforts for pollution agents for which national standards are established. It is this program which must be effective

> if the Nation is to achieve the quality of air which the bill would mandate in a relatively short period of time." (S. Rep. No. 1214, 91st Cong., 2d Sess. 14 [1970]).

It is this program that was intefered with by the state court suit.

It is clear that a superior federal interest is involved. Stated again, it is federal control of the national air pollution problem which is a problem that respects no state borders. The federal anti-injunction statute was not meant under such circumstances to prevent the stay by a federal court of state court proceedings interfering with the superior federal interest. *Leiter Minerals* v. *United States*, 352 U.S. 220 at 225-6 (1957). For instance, despite anti-injunction statute a federal court was permitted to enjoin a state court action under this principle to prevent interference with a local housing authority's participation in a federal plan for low income housing under the federal Housing Act, *United States* v. *Barrett*, 442 F. 2d 642 at 645-6 (4th Cir. 1971); and a federal court was permitted under this principle to enjoin a state court from enjoining state officials from carrying out acts required under the Federal Voting Rights Act of 1965. *United States* v. *Louisiana*, 265 F. Supp. 703 (E.D. La., 1966).

A private party has standing to properly assert the "superior federal interest" exception to the anti-injunction statute in the public interest as a support for the statutory scheme on which the operation of the superior federal interest is dependent. In *Studebaker* v. *Gittlin*, 360 F. 2d 692 (2nd Cir. 1962) Judge Friendly stated at page 698 that:

> "If the policy of the anti-injunction statute is superceded by the need for immediate and effective enforcement of federal . . . statutes, the fact that en-

> forcement here is by a private party rather than the (federal) agency should not be controlling."

See also *Tampa Phosphate* v. *Seaboard Coast Line*, 418 F. 2d 387 at 393-4 (5th Cir. 1969), cert. den. 397 U.S. 910 (1970), reh. den. 397 U.S. 1030 (1970), *Machesky* v. *Bizzel*, 414 F. 2d 283 at 287-292 (5th Cir. 1969). It is true that private parties have no standing to assert the "superior public interest" in a private dispute removed from the public interest (*Essex Systems* v. *Steinberg*, 335 F. Supp. 298 [S.D. N.Y., 1971]) and in cases in matters involving the N.L.R.B. where that agency, to the exclusion of the public, is by statute made the sole representative of the public interest (*Amalgamated Workers* v. *Edison*, 309 U.S. 251 at 264-5 [1940] cited *N.L.R.B.* v. *Nash-Finch*, 404 U.S. 1381 [1971]), but these situations are not involved in the present case. In this case the Committee is seeking to protect the statutory scheme in the public interest to protect health and has standing to assert the superior federal interest. In the Senate report on the 1970 amendments to the Clean Air Act it is stated:

> "The Courts have granted this review to those being regulated and to those who seek 'to protect the public interest in the proper administration of a regulatory system enacted for their benefit'." (S. Rep. No. 1214, 91st Cong., 2nd Sess. 41 [1970]).

Independent of the above legal arguments, there are compelling reasons for granting this writ for the protection of time schedules for health protection measures and to protect required state participation in the federal implementation plan process. As was shown in a quotation above, the implementation plan is the central process in meeting the national ambient air quality requirements. Such reasons and the provisions of the Clean Air Act bring

this case within the "expressly authorized by Congress" exception to the anti-injunction statute. (28 U.S.C. §2283 [1971]). This is, of course separate from the "superior federal interest" exception to that statute.

Under the Clean Air Act, when a national ambient air quality standard is promulgated, each state, with its familiarity with and proximity to pollution emission sources within its borders, had a mere nine month period in which it was required to start from scratch, consider all sources emitting the pollutant within its borders, propose a suggested plan for control of those sources to meet the new federal standard, give the public time to evaluate the plan, then hold public hearings on the suggested plan, review the testimony of the hearings, make any revisions in the suggested plan required by such testimony, formally pass on its final suggested plan, and transmit it to the Federal Administrator for his approval, modification, or complete revision. (42 U.S.C. §1857c-5[a] [1], 1971). It is clear regarding implementation plans that Congress knew "the bill would require a great deal in a short period of time . . . (and) The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan." (S. Rep. No. 1214, 91st Cong., 2nd Sess. 12 [1970]). On page 41 of that Senate report it was stated that:

> "In order to maintain the integrity of the sequences provided *throughout* the Act, the Bill would provide that *any review sought* must be filed within 30 days of the challenged promulgation or approval" (emphasis added).

Such review could be obtained only in the United States Court of Appeals. (42 U.S.C. §1857h-5[b] [1], 1971).

Despite this, the Court of Appeals held that the limitations on review only applied after the Federal Administrator had acted finally on the implementation plan, and thus there was no express authorization by Congress to stay any state court proceedings under the Clean Air Act. If there was no such congressional intent, then there could be a state court injunction proceeding (providing the "superior federal interest" would not warrant a stay of the state court proceeding) which would, as it has done in this case, delay state action on formally suggesting an implementation plan to the Federal Administrator. Such state trial court action is subject to state appellate court review which is then subject to state supreme court review and even possible review in this Court. When Congress gave states a nine month period to submit suggested implementation plans, as it was shown above, Congress knew that the states would be hard pressed to do the necessary technical work in that nine month period. With this tight schedule due to technical work, it is obvious that Congress did not intend that the state's portion of the federal implementation process would be subject to the various state trial and appellate court levels of review before finalization and transmission for federal review. Such state court review, if it did occur, would, as in this case, be instituted at the end of the nine month period and, conservatively speaking, could add at least a year to the process. Thus, any dissatisfied person or company could by state court review prevent the submission of a state's suggested implementation plan for consideration of the Federal Administrator and destroy the state's required imput into the process since if the state plan is not formally transmitted in final form within the nine month period, the Federal Administrator is required to promulgate its own plan or portions

thereof for the state and that process adds time to the process of achieving the final plan. Further, since the Court of Appeals decision permitted review before final action of the Federal Administrator's final action, the federal *proposal* of a plan for promulgation could also be subject to an injunction suit and appellate review of that suit, further delaying the finalized plan.

All of this was clearly not intended by Congress. Congress clearly intended that the state involved with its knowledge of the pollution sources within its borders should meet the requirement that it submit a suggested plan to control those sources to meet federal standards. This is especially true since, as was shown above, the federal implementation plan would pre-empt the states minimum implementation standards. Congress also clearly intended that its deadlines under the Act be met. This is made even clearer by the facts (1) that what would be delayed by state court review would include standards which were "requisite to protect public health" (42 U.S.C. §1857c-4[b][1], 1971); (2) that such state court review would be premature and improper by any standard because it was review of a nonfinalized plan which was subject to change by the Federal Administrator; and (3) that any person in the large group affected by the plan who had objections had the right to federal court review after the Federal Administrator finalized the plan. (42 U.S.C. §1857h-5[b] [1], 1971).

The "expressly authorized by Congress" exception to the anti-injunction statute applies when "an Act of Congress must have created a specific and uniquely federal right or remedy (in this case it involves the achievement of national air quality standards) enforceable in a federal court of equity, which could be frustrated if the federal court were

not empowered to enjoin a state court proceeding". *Mitchum* v. *Foster*, 40 U.S.L.W. 4737, (June 19, 1972). The federal act in this case could only be given its intended scope only by a stay of a state court proceeding for said proceeding destroys required state imput into the federal regulatory scheme because it causes the timetables for such imput to be violated involuntarily by states causing substituted imput; and also because it ruins federal timetables designed to protect human health. The intent of Congress is clear and the exception to the anti-injunction statute expressly applies. It is to be noted that it is no bar to such application that the Clean Air Act does not expressly refer to the anti-injunction statute or does not expressly authorize an injunction of a state court proceeding (*Mitchum* v. *Foster, supra*) or that the injunction power to prevent interference is implied and not stated (*N.L.R.B.* v. *Nash-Finch*, 404 U.S. 1381 [1970]). The Committee has standing to rely on this exception under basic standing concepts because it participated in the hearing that was enjoined from reaching a conclusion, because its members' health will be harmed by that injunction and because its members came within the ambit of the protection intended by the statute.

The situation in this case is of extreme importance since it involves a problem that can and will repeat itself. New air quality standards for pollutants found in coal such as mercury and for pollutants found in many other substances will require more implementation plans, as will changes in existing air quality standards. The grant of this writ is necessary so as to prevent a single dissatisfied person or company from halting required state imput into the federal implementation plan process and to prevent the delaying of deadlines to the detriment of human health as well as to the detriment of industry which needs lead time after a plan is developed to comply with it.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 72-1304

CLEAN AIR COORDINATING COMMITTEE,
Plaintiff-Appellant,

v.

ROTH-ADAM FUEL COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 711

WILLIAM J. LYNCH, *Judge.*

ARGUED JUNE 12, 1972 — DECIDED JULY 3, 1972

Before SWYGERT, *Chief Judge,* FAIRCHILD, and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* According to the verified complaint, plaintiff is an association whose membership consists of several "groups" and more than one thousand individuals. Its purpose is the promotion of air pollution control. Defendant Roth-Adam Fuel Company is a coal-selling corporation doing business in Illinois, and defendant Chicago Coal Merchants Association is a voluntary association representing retailers engaged in the sale of coal in Illinois. The other two defendants are the Illinois Pollution Control Board and the United States Environmental Protection Agency, both governmental agencies

whose purposes include air pollution control. Neither took any position with respect to this controversy although the state Board indicated its intent to intervene as a plaintiff.

According to plaintiff, on April 30, 1971, the United States Environmental Protection Agency adopted primary and secondary ambient air quality standards for particulate matter and sulphur dioxide under the Clean Air Act (42 U.S.C. § 1857 *et seq.*). Under that Act, each state "shall, after reasonable notice and public hearings, adopt and submit to the Administrator" of that agency a plan for the implementation, maintenance and enforcement of such standards within nine months after their promulgation by the Administrator (42 U.S.C. § 1857c-5 (a)(1)). Four months after the submission date, the Administrator must approve or disapprove such plan.

The Illinois Pollution Control Board proposed an implementation plan for air pollution control in Illinois on December 8, 1971. The Board simultaneously announced that its proposed plan would be modified in accordance with its regulations and in response to testimony at public hearings. The Illinois plan included proposed Rule 203(g)(1)(A) which concededly would result in a total ban on the use of coal for residential and commercial space heating purposes in the Chicago Major Metropolitan Area.[1] The Illinois plan was first submitted

[1] Plaintiff does not controvert defendants' description of said rule as limiting "the emission of particulate matter from existing solid fuel combustion sources located in the Chicago Major Metropolitan Area to 0.1 pounds of particulate matter per million btu of heat input in any one hour period." The Rule itself provides:

"(a) *Particulate Emission Standards and Limitations for Fuel Combustion Emission Sources.*

"(1) *Fuel Combustion Emission Sources Using Solid Fuel Exclusively.*

"(A) *Existing Fuel Combustion Emission Sources Using Solid Fuel Exclusively Located in the Chicago Major Metropolitan Area.* No person shall cause or allow the emission of particulate matter into the atmosphere from any existing fuel combustion source using solid fuel exclusively, located in the Chicago Major Metropolitan area, to exceed 0.1 pounds of particulate matter per million btu of actual heat input in any one hour period except as provided in sub-paragraph (C) of this Rule 203(g)(1)."

to the United States Environmental Protection Agency on January 30, 1972. On April 13, 1972, after a series of hearings, all of the proposed regulations of the Illinois Pollution Control Board were adopted by that board and submitted to the federal agency with the proviso that Rule 203(g)(1)(A) (which is not to become effective until May 30, 1975) should not be considered to ban the use of coal for space heating in residential and commercial buildings in the Chicago Major Metropolitan Area.[1]

On March 14, 1972, a few days prior to the filing of the federal suit, defendants Roth-Adam Fuel Company and Chicago Coal Merchants Association filed suit in the Circuit Court of Cook County, Illinois, to enjoin the Illinois Pollution Control Board from adopting Rule 203(g)(1)(A) or an equivalent rule. Plaintiff's federal suit prayed that those defendants be enjoined from proceeding any further with the state court suit.

Defendant Roth-Adam Fuel Company filed a motion to strike the complaint and to dismiss the cause, asserting *inter alia* that the district court had no jurisdiction and that the Federal Anti-injunction Act (28 U.S.C. § 2283) prohibited the issuance of an injunction against the state court proceedings. On March 31, the district court denied defendants' motion to strike the complaint and by agreement dismissed the United States Environmental Protection Agency as a defendant. A fortnight thereafter, the district court heard arguments on plaintiff's motion for a preliminary injunction and concluded that although it did not have exclusive jurisdiction of the subject matter, it had concurrent jurisdiction with the Circuit Court of Cook County. The district court decided that its hand "will be stayed until further notice of this Court."

On April 13, 1972, the Circuit Court of Cook County entered a temporary restraining order against the Illinois Pollution Control Board pending a hearing on the motion

[1] The proviso was based on the April 13, 1972, restraining order of the Circuit Court of Cook County and remains in effect under that court's April 27, 1972, preliminary injunction. See *infra*, pgs. 3-4. The proviso applies to the Illinois Pollution Board and does not bind the federal Administrator. (See Response of Defendants-Appellees to Motion for Injunction, p. 10, and their Response to Motion for Accelerated Briefing Schedule, p. 3.)

for preliminary and permanent injunctions. On April 27, 1972, that court entered a preliminary injunction enjoining the Illinois Pollution Control Board from adopting Rule 203(g)(1)(A) or its equivalent unless the rule should "provide for compensation to parties whose businesses are injured and to parties who are otherwise injured by the adoption of such rule."[3] An interlocutory appeal was taken to the Appellate Court of Illinois on April 28, 1972, by the Illinois Pollution Control Board, and it is to be heard on an expedited schedule. We also expedited the appeal from the district court's stay.

Defendants assert that the district court's stay order was not appealable. Although defendants contend that the district judge merely stayed his hand pending determination of the issues in the state court proceeding, plaintiff did not seek to litigate in federal court the same issues as were before the state court. Rather plaintiff sought to enjoin the defendants' proceeding in the state court, which proceeding was itself the gravamen of plaintiff's federal statutory claim.[4] Consequently, the district court's finding of concurrent jurisdiction and indefinite stay allowing the state court to proceed in effect constituted the refusal of a preliminary injunction within the meaning of 28 U.S.C. § 1292(a)(1). Under these circumstances, we hold that the district judge's failure to grant the preliminary injunction was appealable. *Weiss* v. *Duberstein*, 445 F.2d 1297, 1299 (2d Cir. 1971); *United States* v. *Lynd*, 301 F.2d 818, 822 (5th Cir. 1962); see *Allico National Corporation* v. *Amalgamated Meat Cutters*, 397 F.2d 727, 729 (7th Cir. 1968).

Defendants also contend that 28 U.S.C. § 2283, the federal anti-injunction statute, bars enjoining the state court proceedings. That statute provides as follows:

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[3] See Supplement to Response of Defendants-Appellees to Motion for Injunction, p. 2.

[4] Succinctly put, plaintiff claimed below and claims here that state court review delaying unqualified submission of the implementation plan to the Federal Administrator contravenes 42 U.S.C. § 1857c-5 by preventing compliance with the nine-month time limit for submission prescribed therein and 42 U.S.C. § 1857h-5(b)(1), which provides for review of the Administrator's action in approving or promulgating any implementation plan under Section 1857c-5 only in a United States Court of Appeals.

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In our judgement, none of the three exceptions applies, so that the district court should have dismissed this action. The second and third exceptions are not even arguably applicable. As the Supreme Court has recently explained, if this action "is not an 'expressly authorized' statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding * * * regardless of how extraordinary the particular circumstances may be." *Mitchum* v. *Foster*, 40 U.S.L.W. 4737, 4738 (June 19, 1972). Although "an authorization need not expressly refer to §2283," "in the present case we are directed to no 'express' authorization within even the most attenuated meaning of the term." *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511, 516. The language of the Federal Clean Air Act, even as illuminated by the legislative history, contains nothing which can fairly be interpreted as an authorization much less an "express authorization." An exception may be implied in favor of a federal agency "where its federal power pre-empts the field." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Here, however, the federal domain is not exclusive. "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained * * * ." 42 U.S.C. § 1857c-2(a); see also 42 U.S.C. §1857 (a)(3). So far we are not persuaded to read the term "responsibility" so narrowly as to exclude assurance through state court review that the state pollution board's proposed plan is a valid exercise of that board's state-given powers. It is significant too that here "it is [not] a public authority that seeks protection of that domain." *National Labor Relations Board* v. *Nash-Finch*

Co., supra, at 147; see *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220, 225-226. The United States Environmental Protection Agency has not seen fit to seek an injunction.

It may be that in an appropriate case where "there is little question that if the [federal agency] had sought the injunction * * *, § 2283 would not have blocked its way," a private suit which is "a necessary supplement" to agency action for enforcement of the specific provision in question may overcome the bar. *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692, 698 (2d Cir. 1966). Here, however, it is far from clear that even the United States Environmental Protection Agency could have surmounted the bar of § 2283. 42 U.S.C. § 1857c-5(c) provides for what action the Administrator of that agency shall take in the event a "State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed." In such event he "shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof * * *." If the state remains delinquent, these regulations must be promulgated within six months after the required submission date. This specific sanction is at least not clearly consistent with an authorization of the Administrator to sue for an injunction against state court proceedings delaying transmission of the complete implementation plan. Surely the Act fails to meet the test of "clearly creating a federal right or remedy enforceable in a federal court of equity, [which] could be given its intended scope only by the stay of a state court proceeding." *Mitchum* v. *Foster, supra* at 4740. Moreover, although the Federal Clean Air Act provides for citizen participation by way of public hearings on implementation plans (42 U.S.C. §§ 1857c-5(a)(1), 1857 c-5(c)) and by way of suit to enforce substantive emission standards or limitations (42 U.S.C. § 1857h-2), it can hardly be said that a private suit is a "necessary supplement" to agency action in seeking compliance with the phase of the Act dealing with time limitations. *Studebaker Corp.* v. *Gittlin, supra,* does not control this case. See *Essex Systems Co., Inc.* v. *Steinberg,* 335 F.Supp. 298 (S.D. N.Y. 1971).

As the defendants have pointed out, the regulation in question was promulgated by a state agency, *viz.*, the Illinois Pollution Control Board under the Illinois Environmental Protection Act (Ill. Rev. Stat. 1971, ch. 111-½, §§ 1001 *et seq.*). That regulation appears to be reviewable under §§ 1029 and 1041 of that statute, pursuant to the provisions of the Illinois Administrative Review Act (Ill. Rev. Stat. 1971, ch. 110, §§ 264-279). We have found no provision in the Federal Clean Air Act definitely prohibiting such review. 42 U.S.C. § 1857 h-5(b)(1), on which plaintiff relies, provides for exclusive United States Court of Appeals review of "the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 • • •," but says nothing about review of the proposals of state anti-pollution agencies. In view of the May 30, 1975, effective date for Rule 203(g)(1)(A), plaintiff has not satisfied us that the progression of the state appeal would unduly delay the regulation. This is especially so because the state already being delinquent according to plaintiff, the federal Administrator now is free to disapprove of the present court-imposed proviso to the Rule making it inapplicable to the Chicago area or he may propose his own regulation to be promulgated within six months after the original submission date, so that the scheme of the Federal Clean Air Act has not been thwarted by the state court suit.

Since our ruling is based on the Federal Anti-injunction Act, we need not consider the parties' other arguments with respect to the district court's jurisdiction. It is not alleged that the Administrator of the Environmental Protection Agency has yet approved or promulgated any implementation plan for Illinois, so that we as yet have no jurisdiction to review his action under 42 U.S.C. § 1857h-5(b)(1).

Treating the order appealed from as a denial of an injunction, it is affirmed. Since 28 U.S.C. § 2283 forbids the relief sought, the district court is directed to dismiss

the action. Costs on appeal are awarded appellees Roth-Adam Fuel Company and Chicago Coal Merchants Association.[*]

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

[*] The motion to dismiss the appeal was abandoned and is denied since plaintiff did file the requisite cost bond.

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